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July 28, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: January 24, 2005

Case Number: TSO-0185

This decision concerns the eligibility of XXXXXXXXX (hereinafter referred to as "the Individual") to have his access authorization restored under the regulations set forth at 10 C.F.R. Part 710, entitled "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material."¹

I. BACKGROUND

The present case concerns an individual who seeks reinstatement of his DOE access authorization. The Individual's access authorization was suspended when derogatory information that raised a significant doubt about his eligibility to maintain his access authorization came to the attention of a DOE Local Security Office (LSO). The LSO obtained this derogatory information during a background re-investigation of the Individual. After conducting this background investigation, the LSO concluded that the Individual failed to resolve the substantial doubts about his eligibility for a DOE access authorization that the derogatory information caused. Accordingly, an administrative review proceeding was initiated. *See* 10 C.F.R. § 710.9. The LSO then issued a letter notifying the Individual that it possessed information that raised a substantial doubt concerning his eligibility for access authorization (the Notification Letter). The Notification Letter alleges that the Individual has

(1) Deliberately misrepresented, falsified, or omitted significant information from a . . . Questionnaire for Sensitive (or National Security) Positions, . . . a personnel security interview, written or oral statements made in response to official inquiry on a matter that is relevant to a determination regarding eligibility for DOE access authorization, or proceedings conducted pursuant to § 710.20 through § 710.31, 10 C.F.R. § 710.8(f) (Criterion F);

(2) Trafficked in, sold, transferred, possessed, used, or experimented with a drug or other substance listed in the Schedule of Controlled Substances established

¹ An access authorization is an administrative determination that an individual is eligible for access to classified matter or special nuclear material. 10 C.F.R. § 710.5. Such authorization will be referred to in this Decision as an access authorization or a security clearance.

pursuant to section 202 of the Controlled Substances Act of 1970 (such as marijuana, cocaine, amphetamines, barbiturates, narcotics, etc.) except as prescribed or administered by a physician licensed to dispense drugs in the practice of medicine, or as otherwise authorized by Federal law. 10 C.F.R. §710.8(k) (Criterion K); and

(3) Engaged in any unusual conduct or is subject to any circumstances which tend to show that the individual is not honest, reliable, or trustworthy; or which furnishes reason to believe that the individual may be subject to pressure, coercion, exploitation, or duress which may cause the individual to act contrary to the best interests of the national security . . . 10 C.F.R. § 710.8(l) (Criterion L).

The Individual filed a request for a hearing in which he made a general denial of the allegations contained in the Notification Letter. This request was forwarded to the Director of the Office of Hearings and Appeals (OHA), who appointed me as Hearing Officer.

At the Hearing, the LSO presented no witnesses. The Individual testified on his own behalf and called two witnesses: a coworker and his supervisor. *See* Transcript of Hearing, Case No. TSO-0199 (hereinafter cited as “Tr.”).

II. STANDARD OF REVIEW

The Hearing Officer's role in this proceeding is to evaluate the evidence presented by the agency and the Individual, and to render a decision based on that evidence. *See* 10 C.F.R. § 710.27(a). The regulations state that “[t]he decision as to access authorization is a comprehensive, common-sense judgment, made after consideration of all the relevant information, favorable or unfavorable, as to whether the granting of access authorization would not endanger the common defense and security and would be clearly consistent with the national interest.” 10 C.F.R. § 710.7(a). I have considered the following factors in rendering this opinion: the nature, extent, and seriousness of the conduct; the circumstances surrounding the conduct, including knowledgeable participation; the frequency and recency of the conduct; the Individual's age and maturity at the time of the conduct; the voluntariness of the Individual's participation; the absence or presence of rehabilitation or reformation and other pertinent behavioral changes; the motivation for the conduct, the potential for pressure, coercion, exploitation, or duress; the likelihood of continuation or recurrence; and other relevant and material factors. *See* 10 C.F.R. §§ 710.7(c), 710.27(a). The discussion below reflects my application of these factors to the testimony and exhibits presented by both sides in this case.

III. FINDINGS OF LAW AND FACT

A. Background

The Individual experimented with marijuana on several occasions while attending college during the years 1987 through 1992. Tr. at 15-16; Transcript of PSI (hereinafter cited as “PSI”) at 23. Upon graduation in 1992, the Individual began working at a DOE facility. On November 1,

1993, the Individual completed and submitted a Questionnaire for Sensitive Positions form (QSP) to the LSO for the purpose of obtaining a DOE access authorization. Question 25 of that QSP asked “[i]n the last 5 years, have you used, possessed, supplied, or manufactured any illegal drugs? When used without a prescription, illegal drugs include marijuana” The Individual answered this question “no.” DOE Exhibit 7; Tr. at 12-13.

The Individual claims that he abstained from using marijuana after graduating from college until either 2000 or 2001, when he used marijuana on two separate occasions. Tr. at 14, 20; PSI at 21-22, 26. This marijuana use occurred while the Individual possessed a DOE access authorization. Tr. at 14. On December 20, 2002, the Individual completed and submitted another security form. This form, entitled “Questionnaire for National Security Position” (QNSP), also inquired about drug use.² Question Number 24a of that form inquired: “Since the age of 16 or in the last seven years, whichever is shorter, have you illegally used any controlled substances, for example marijuana . . . ?” Tr. at 13; PSI at 29. The Individual answered that question “no”. PSI at 29. On April 22, 2003, the Individual was interviewed by a background investigator (the Investigator). During this interview, the Individual informed the Investigator that he had used marijuana on only one occasion.³ Tr. at 11, 21-22; PSI at 29-30.

On July 28, 2004, an LSO Security Official conducted a PSI of the Individual. During this PSI, the Individual admitted providing false information on the QSP, the QNSP and during his interview with the Investigator. PSI at 12-13, 29-30. The Individual also revealed that, in addition to his marijuana use during college, he also used marijuana on two occasions in 2000 or 2001. PSI at 21-22, 26. At the Hearing, the Individual explained that he had admitted his additional marijuana use and provision of false information to security officials at the PSI because he “didn’t feel good about it” and because he “wanted to tell the truth.” Tr. at 22.

B. Analysis

The Individual has admitted that he intentionally provided DOE security officials with false information on at least three occasions: when he lied to the OPM Investigator about his marijuana use during the April 22, 2003 interview and when he intentionally omitted information about his marijuana use from a November 1, 1993 QSP and a December 20, 2002 QNSP. Moreover, the Individual admits using marijuana while possessing a DOE access authorization on two occasions. The incidents discussed above provide a sound basis for the LSO’s decision to invoke Criteria F, K and L.

The basis for the LSO’s security concerns is obvious. False statements by an individual in the course of an official inquiry regarding a determination of eligibility for DOE access authorization raise serious issues of honesty, reliability, and trustworthiness. The DOE security program is based on trust, and when a security clearance holder breaches that trust, it is difficult to determine to what extent the individual can be trusted again in the future. *See e.g., Personnel Security Hearing, Case No. VSO-0281*, 27 DOE ¶ 82,821 at 85,915 (1999), *affirmed*, 27 DOE ¶

² Unfortunately, the LSO did not submit a copy of the December 20, 2002 QNSP.

³ Unfortunately, the LSO did not submit a copy of the Investigator’s Report.

83,030 (2000) (case terminated by OSA, 2000); *Personnel Security Hearing, Case No. VSO-0013*, 25 DOE ¶ 82,752 at 85,515 (1995) *affirmed* (OSA, 1995).

Illegal drug use evidences an unacceptable and disturbing disregard for laws prohibiting their use. Such disregard for the law raises concerns that the Individual may similarly disregard other laws, including those which protect classified information and special nuclear materials. *See Personnel Security Hearing, Case No. VSO-0116*, 26 DOE ¶ 82,765 at 85,602 (1997) *citing Personnel Security Hearing, Case No. VSO-0013*, 25 DOE ¶ 82,752 at 85,512 (1995)). Moreover, the use of illegal drugs (and the disregard for law and authority that such use suggests) indicates a serious lapse in judgment and maturity. Involvement with illegal drugs may also render the user susceptible to blackmail or coercion. The concerns raised by an individual's illegal drug use are heightened when the drug use occurs while the Individual maintains a DOE security clearance, since avoiding illegal drug use is a requirement of both the DOE's safety and security regulations. *Personnel Security Hearing Case No. VSO-0289*, 27 DOE ¶ 82,823 (1999) (*citing Personnel Security Hearing, Case No. VSO-0023*, 25 DOE ¶ 82,761 at 85,579 (1995)).

A finding of derogatory information does not, however, end the evaluation of evidence concerning the individual's eligibility for access authorization. *See Personnel Security Hearing, Case No. VSO-0244*, 27 DOE ¶ 82,797 *affirmed* (OSA, 1999); *Personnel Security Hearing, Case No. VSO-0154*, 26 DOE ¶ 82,794 (1997), *affirmed*, *Personnel Security Review Case No. VSA-0154*, 27 DOE ¶ 83,008 *affirmed* (OSA, 1998). In the end, like all Hearing Officers, I must exercise my common sense judgment in determining whether an individual's access authorization should be restored after considering the applicable factors prescribed in 10 C.F.R. § 710.7(c). Therefore, I must consider whether the Individual has submitted sufficient evidence of mitigation to resolve the security concerns raised by his illegal drug use, omissions and false statements.

According to the Individual, his involvement with marijuana has been minimal. Nothing in the Record contradicts this assertion. However, on two occasions, the Individual used marijuana while possessing a DOE access authorization. Since, these transgressions occurred four or five years ago, were confined to just two isolated incidents, and are now clearly regretted by the Individual, I find that the security concerns raised by the Individual's marijuana use have been resolved.

However, I am not convinced that the DOE can rely on the Individual to provide honest and accurate information in the future. On at least three occasions, over a ten-year period, the Individual has provided false information to LSO Security Officials. These falsifications establish a pattern of unreliability.

In a number of decisions, DOE Hearing Officers have considered the implications of falsifications. The factors considered in these cases include the following: whether the individual came forward voluntarily to renounce his falsifications, *compare Personnel Security Hearing, Case No. VSO-0037*, 25 DOE ¶ 82,778 (1995), *affirmed* (OSA, 1996) (voluntary disclosure by the individual), *with Personnel Security Hearing, Case No. VSO-0327* (2000),

affirmed (OSA 2000) (falsification discovered by DOE security); the length of time the falsehood was maintained; whether a pattern of falsification is evident; and the amount of time that has transpired since the individual's admission. *See Personnel Security Hearing, Case No. VSO-0327* (2000), *affirmed* (OSA, 2000) (less than a year of truthfulness insufficient to overcome long history of misstating professional credentials). *See also Personnel Security Hearing, Case No. VSO-0289*, 27 DOE ¶ 82,823 (1999) (19 months since last falsification not sufficient evidence of reformation from falsifying by denying drug use). *Personnel Security Hearing, Case No. VSO-0319*, 27 DOE ¶ 82,851 (2000), *affirmed* (OSA, 2000).

Turning to the present case, I note that the Individual eventually came forward and voluntarily admitted his falsifications to the LSO's Security Officials. *Compare Personnel Security Hearing, Case No. VSO-0037*, 25 DOE ¶ 82,778 (1995), *affirmed* (OSA, 1996) (voluntary disclosure by the individual), *with Personnel Security Hearing, Case No. VSO-0327*, 27 DOE ¶ 82,844 (2000) (falsification discovered by DOE security). Had the Individual not come forward with this information, it is unlikely that it would have come to the LSO's attention. The fact that the Individual himself revealed his marijuana use and falsifications provides strong evidence in support of mitigation.

However, the Individual has a ten-year history of withholding significant information and intentionally providing false information to DOE. Moreover, the number of occasions on which the Individual intentionally either omitted significant information or provided false information establishes a pattern of deliberate falsification and omission. Both of these factors suggest that the security concerns raised by the Individual's omissions and falsifications have not yet been significantly resolved.

At the time of the hearing, only 10 months had elapsed from the date when the Individual finally admitted the truth about his marijuana use. Our previous cases have stated that a subsequent pattern of responsible behavior is of vital importance to mitigating security concerns arising from irresponsible behavior. *See Personnel Security Hearing, Case No. VSO-0499*, 28 DOE ¶ 82,850 (2002). In most cases in which Hearing Officers have concluded that doubts about an individual's judgment and reliability raised by evidence of falsification have been resolved, a substantial period of time has passed since the falsification. In these cases, the time period has allowed individuals to establish a pattern of responsible behavior. In those cases where an individual was unable to establish a sustained period of responsible behavior, Hearing Officers have generally determined that the individual was not eligible to hold an access authorization. *See Personnel Security Hearing, Case No. VSO-0448*, 28 DOE ¶ 82,816 (2001) (11 months not sufficient to mitigate four year period of deception); *Personnel Security Hearing, Case No. VSO-0327*, 27 DOE ¶ 82,844 (2000) (less than one year of truthfulness insufficient to overcome long history of misstating professional credentials); *Personnel Security Hearing, Case No. VSO-0289*, 27 DOE ¶ 82,823 (1999) (19 months since last falsification not sufficient evidence of reformation). Given the facts of this case, I cannot find that 10 months of responsible behavior is sufficient to mitigate the security concerns associated with a ten-year period of deception. Therefore, the security concerns set forth in the Notification Letter under Criteria F and L remain unresolved.

IV. CONCLUSION

For the reasons set forth above, I conclude that the Individual has not resolved the security concerns raised under Criteria F and L. Therefore, the Individual has not demonstrated that restoring his security clearance would not endanger the common defense and would be clearly consistent with the national interest. Accordingly, it is my opinion that the Individual's access authorization should not be restored. The Individual may seek review of this Decision by an Appeal Panel under the procedures set forth at 10 C.F.R. § 710.28.

Steven L. Fine
Hearing Officer
Office of Hearings and Appeals

Date: July 28, 2005